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No. 89-893

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARYLAND PEST CONTROL ASSOCIATION, *et al.*,
Petitioners,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States District Court and Court of Appeals for the Fourth Circuit properly deny attorney's fees based on a claimed violation of the Civil Rights Act (42 U.S.C. § 1983) where the sole claim upon which Petitioners prevailed was that the County laws enacted by Respondents were preempted by Federal law under the Supremacy Clause of the United States Constitution?

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BRIEF IN OPPOSITION

Respondents, Montgomery County, Maryland and Prince George's County, Maryland, oppose the Petition for a Writ of Certiorari for the reasons stated below.

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Appeals for the Fourth Circuit (No. 88-1005) decided September 8, 1989 affirming the decision of the United States District Court for the District of Maryland (CA 86-1688) dated February 3, 1988. The decision of the District Court held:

1. that the County Pesticide Ordinances were "preempted by the Federal Insecticide, Fungicide and Rodenticide Act ('FIFRA')"; (A-28)

2. that "Plaintiffs' constitutional claims were based on the Supremacy Clause"; (A-29)

3. that the Supremacy Clause does not "secure rights" as that term is used in 28 U.S.C. § 1343 (a)(3) (District Court jurisdiction) and does not "secure rights" under 42 U.S.C. § 1983 (civil rights); (A-29)

4. that § 1983 does not apply "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983" (citing *Wright v. City of Roanoke Redevelopment and Housing Authority*, 107 S.Ct. 766, 770 (1987)) and that both these exceptions apply in this case; (A-31, 32)

5. that the Plaintiffs were therefore not entitled to attorneys' fees under 42 U.S.C. § 1988. (A-33)

The Court of Appeals for the Fourth Circuit, recognizing that the underlying decision in the case was based on preemption, held that "the Supremacy Clause does not of itself create 'rights, privileges, or immunities' within the meaning of § 1983" and affirmed the District Court's denial of the motion for attorneys' fees. (A-39, 40)

To appeal the decisions of the District Court and Court of Appeals, the Petitioners have filed this petition.

SUMMARY OF ARGUMENT

1. Petitioners' arguments are based on the erroneous premise that the County laws in question violate an "explicit provision of federal law" which is actionable under 42 U.S.C. § 1983.

2. The United States District Court and Court of Appeals made no such finding and, in fact, based their decisions strictly on preemption of local law by provisions of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

3. The Courts' findings of preemption in this case were not based upon any "explicit prohibition of federal law" but on the lack of express authority for local regulation together with an examination of the legislative history of the federal statute.

4. The Petitioners did not prevail on their Civil Rights claims in this case. The District Court's decision, as affirmed by the Court of Appeals, declared only that the County laws were invalid due to preemption.

5. The Petitioners could not have prevailed on their Civil Rights claim in any case because neither the Supremacy Clause nor § 136v(a) of FIFRA creates private rights enforceable under 42 U.S.C. § 1983.

6. Because Petitioners did not prevail in a claim under § 1983 they have no right to an award of attorneys' fees under § 1988.

ARGUMENT

This petition presents a very narrow issue for the Court to review. Petitioners concede that preemption in itself is not actionable under 42 U.S.C. § 1983. Petitioners do not dispute the analysis of the District Court based on the *Chapman, Thiboutot, White Mountain* and *Wright* cases. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905 (1979); *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502 (1980); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir.) (amended opinion), *cert. denied*, 479 U.S. 1060, 107 S.Ct. 940 (1987); *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766 (1987).

Instead, Petitioners seize on the narrow issue left undecided by the *White Mountain Case*, *supra*, namely whether preemption may be a basis for a claim under § 1983 if it involves a conflict with an "explicit provision of federal law." Having discovered this narrow crack, Petitioners attempt to force open the door to an appeal in this case. The factual wedge they have chosen, however, is a misstatement of the findings of the lower courts and the applicable federal law. Petitioners state repeatedly that this case involves a direct conflict between local law and express provisions of § 136v(a) of FIFRA, and that the District Court and Court of Appeals so found. Neither of these claims is true. Section 136v(a) does not forbid local governments to do anything. In fact, it contains no reference to local government. Its sole reference is to the states, and it is not a prohibition but a grant of authority to the states. Section 136v(a) reads as follows:

> "(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act."

As can be seen, § 136v(a) makes no reference to local governments. The District Court determined that the *intent* of the statute was that the term "State" was not meant to include the State's political subdivisions. The Court determined this by construing the statute as a whole and by looking at the legislative history of this section.

The *implication* of this determination, the Court found, is that subdivisions of the states are not authorized to regulate, and the District Court therefore held that local government regulation of pesticides was preempted. This is a far cry, however, from determining that there is a "direct prohibition against local legislation set forth in

the statute itself" (Pet. Brf. 10) or that the local legislation was in conflict with an "explicit provision of Federal law." (Pet. Brf. 14)

Section 1983 provides redress for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." of the United States. Both the District Court and the Fourth Circuit Court of Appeals recognized, as determined in the *Chapman* case, that "the Supremacy Clause, standing alone, 'secures' Federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it 'secure' such rights within the meaning of § 1983." (A-29; A-43, quoting *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir.) (amended opinion), *cert. denied*, 107 S.Ct. 940 (1987)). Indeed, the issue in the present case is no different from that presented in *White Mountain* itself. The provisions of § 136v(a) deal only with the allocation of power between the federal and State/local governments and were not intended to confer private rights. The analysis and conclusion found in *White Mountain* might thus be applied equally well in this case. (See *White Mtn. supra*, 810 F.2d at 848 *et seq.*)

CONCLUSION

If, as the *White Mountain* case suggests, there is room to create an exception to the holding in *Chapman* for preemption cases which involve a conflict with an "explicit provision of federal law," this is not the case to resolve that issue. There is no "explicit provision of federal law" in conflict with the local statutes involved in this case. The intent of Congress to prohibit local legislation is decidedly *implicit* in the language of § 136v(a), requiring interpretation of the intent of the statute as a whole and a careful examination of the legislative history. This case falls clearly within the general rule

established in *Chapman, supra*, and the petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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